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No. A-431

Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1977

G. M. LEASING CORP., and
GEORGE I. NORMAN, III.,

Petitioners,

v.

THE UNITED STATES OF AMERICA, et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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CONSTITUTIONAL PROVISION

Fourth Amendment to the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In the Supreme Court of the United States

October Term, 1977

No. A-421

G. M. LEASING CORP., and
GEORGE I. NORMAN, III.,

Petitioners,

v.

THE UNITED STATES OF AMERICA, et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The findings of fact and conclusions of law, together with the judgment rendered in the United States District Court were unreported.

The opinion of the Court of Appeals, affirming in part and reversing in part the United States District Court for the District of Utah, is reported at 514 F.2d 935 (10th Cir., 1975).

The opinion of the United States Supreme Court, affirming in part and reversing in part the decision of the United States Court of Appeals for the Tenth Circuit, is reported at 429 U.S. 338 (1975).

The opinion of the United States Court of Appeals for the Tenth Circuit (Appendix A, *infra* A-1), reversing and remanding to the United States District Court for the District of Utah, is reported at 560 F.2d 1011 (10th Cir. 1977).

JURISDICTION

The judgment of the Court of Appeals was entered on August 19, 1977, (Appendix A, *infra* A-1). By order dated November 14, 1977 Mr. Justice White extended the time for filing a petition for writ of certiorari to and including December 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether, having violated petitioners' Fourth Amendment rights by an intrusion upon their private property without proper consent or valid search warrant, is an agent of the United States immune from the payment of money damages where the agent acted in reliance upon the erroneous advice of counsel.

STATEMENT

In connection with an investigation of the income tax liability of the taxpayer, the Internal Revenue Service determined deficiencies and made jeopardy assessments pursuant to section 6861(a) of the Internal Revenue Code of 1954.

For the purpose of levying on property subject to seizure, agents of the Internal Revenue Service went to petitioners' office, a cottage-type building and made a warrantless, forced entry.

In *G. M. Leasing Corp.*, supra, pp 2 this Court held the warrantless entry into the petitioners' office violated the taxpayers' Fourth Amendment rights.

Having determined a violation of the petitioners' Fourth Amendment rights had occurred, this Court remanded the case to the Court of Appeals for the purpose of determining whether the petitioners were entitled to money damages or, in the alternative, was the defendant immune from the payment of such damages.

The Court of Appeals held, relying upon *Bivens v. Six Unknown Federal Narcotic Agents*, 456 F.2d 1339 (2nd Cir., 1972), that although no absolute immunity was available, the petitioners were nevertheless not entitled to money damages since the agents relied upon the advice of counsel that the seizure could be undertaken as it was.

REASONS FOR GRANTING THE WRIT

1. This Court reserved its consideration of the immunity question, both in *G. M. Leasing Corp. v. United States*, supra, pp. 2 and in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

Each Court of Appeals upon remand held that no absolute immunity was available but that the defendant(s) in each case were nevertheless not liable for the payment of money damages since the acts complained of were, in each case, undertaken in good faith.

The question of whether there will be immunity based on good faith, so as to preclude the liability for money damages, has not been the subject of consideration by this Court.

This Court should grant the writ for the purpose of considering whether good faith on the part of the warrantless intruders shall be a sufficient basis for denial of money damages.

2. The Court of Appeals held that good faith could be based on erroneous advice of counsel.

The warrantless violation of the Fourth Amendment in *Bivens*, supra, resulted in an arrest of the petitioner. The Fourth Amendment violation in *Bivens*, supra, was excused on the basis that the F.B.I. narcotics agents' lives are in constant danger in performing functions wherein they should not be left defenseless. The unlawful act was undertaken for the purpose of apprehending a criminal.

The Fourth Amendment violation in this case was excused on the basis that it made no sense to expect the agent to second-guess the advice of counsel and, accordingly, the agent acted in good faith.

The unlawful advice of counsel upon which the agent relied was obtained from a superior, a person who also represented the United States in the same civil proceeding.

No lives were in jeopardy, nor was any attempt being made to escape apprehension. The objective of the search was to obtain property to be used for the purpose of satisfying a civil judgment and/or to obtain evidence to be utilized in connection with Federal tax proceedings.

This Court has not considered the distinction between warrantless intrusions in the course of apprehending a criminal and an intrusion in the course of obtaining collection of a civil obligation.

The Court should grant the writ for the purpose of considering whether a reliance by the agent upon the

improper advice of counsel will permit the agent to claim he acted in good faith.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Joseph Jay Bullock,

Attorney for Petitioners

December 1977

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 74-1436

G. M. LEASING CORP.,

Plaintiff-Appellee,

and

GEORGE I. NORMAN III,

Plaintiff-Intervenor,

v.

THE UNITED STATES OF AMERICA, et al,

Dependants-Appellants.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Myron C. Baum, Acting Assistant Attorney General; Gilbert E. Andrews, Jonathan S. Cohen, and Stephen M. Gelber, Attorneys; Tax Division, Department of Justice, Washington, D.C.; and Ramon M. Child, United States Attorney, for Defendants-Appellants. Richard J. Leedy, Salt Lake City, Utah, for Plaintiff-Appellee.

Before HILL, SETH and BARRETT, United States Circuit Judges.

HILL, Circuit Judge.

We have this case on remand, *G. M. Leasing Corp. v. United States*, ... U.S. ..... (1977), and must address the questions of money damages against agents of the Internal Revenue Service (IRS) for violations of Fourth Amendment rights of G. M. Leasing Corp. (Corporation) committed in levying on property pursuant to a jeopardy assessment and of the applicability of the doctrine of official immunity.

We will recount the fact and prior proceedings briefly.[1] George I. Norman, Jr., failed to file proper personal income tax returns for the calendar years 1970 and 1971. A subsequent investigation resulted in jeopardy assessments against Norman and his wife in excess of $1,000,000. IRS determined that Corporation, ostensibly a luxury car and boat leasing business, was Norman's alter ego and that the corporate assets were subject to levy to satisfy Norman's tax liability. IRS levied upon certain of Norman's personal assets and certain assets of Corporation. We are presently concerned with activities of IRS agents in effecting the levy on assets of Corporation contained within a cottage used as its business office in Salt Lake City, Utah. On March 21, 1973, agents came to the cottage and gained entry with the aid of a locksmith. Norman's son, George I. Norman III, who was using the cottage as a residence, arrived at that point and inquired what the agents were doing. As a result of their uncertainty as to whether the cottage was a residence or a business,

[1] The facts are more fully set out in the prior opinions. G.M. Leasing Corp. v. United States, 514 F.2d 935 (10th Cir. 1975), ... U.S. ..... (1977).

the agents left without seizing any property. They returned on March 23, 1973, again entered with the aid of a locksmith, and seized the furnishings and some business records of Corporation.

This action, originally filed May 3, 1973, in the United States District Court for the District of Utah, challenged the jeopardy assessments against Norman and his wife, challenged the IRS determination that Corporation was Norman's alter ego, and claimed damages against individual IRS officers for their warrantless seizure of assets.[2] The United States counterclaimed for foreclosure on the jeopardy assessment. After a non-jury trial, the district court found, *inter alia*, that the assessment was erroneous, the Normans had no tax liability for the years 1970 and 1971, Corporation was not Norman's alter ego, the agents' activities constituted an illegal search and seizure, Agent Philip J. Clayton participated in the search and seizure with malice, and Corporation was entitled to recover money damages in an undetermined amount. The district court denied the government's counterclaim. On these issues, we reversed the district court. G. M. Leasing Corp. v. United States, 514 F.2d 935 (10th Cir. 1975).

The Supreme Court granted certiorari on Corporation's petition, 423 U.S. 1031 (1975), to decide

[2] Norman's son was permitted to intervene and filed a claim with regard to stock seized by the IRS officers to which he claimed ownership. His claim has been previously disposed of. G.M. Leasing Corp. v. United States, **supra**.

whether the IRS agents violated Corporation's Fourth Amendment rights in conducting the seizure of assets. The Court determined that although the agents properly levied upon Corporation's property located in places where no privacy interest was involved,[3] the warrantless entry into the cottage constituted an unreasonable search.

We are now directed to consider the issue of damages against the individual agents.

The case of Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), makes it clear that a cause of action for damages will lie against a federal officer or agent who violates Fourth Amendment rights under color of his authority. The remaining question is whether the doctrine of official immunity shields the IRS agents from such an action, for it is now the law of the case that they violated Corporation's Fourth Amendment rights in entering the cottage without a search warrant.

A modern statement of the doctrine of official immunity is found in *Barr v. Matteo*, 360 U.S. 564 (1959). The Court there upheld a claim of absolute privilege by the director of the Office of Rent Stabilization against a libel action for publishing a press release detailing reasons for termination of personnel. The Court said

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[3] The IRS had also levied upon several luxury automobiles titled to Corporation. The Court said, "The seizures of the automobiles in this case took place on public streets, parking lots, or other open places, and did not involve any invasion of privacy." ..... U.S. at .....; 50 L.Ed. 2d at 543.

that the doctrine of official immunity, largely of judicial making, represents a balance between conflicting interests: the rights of individual citizens to seek redress for wrongs committed by officials of the government and the need for such officials to be free to exercise their duties unfettered by the prospect of being called to defend themselves against damage suits for acts done in the course of their duties. It is applied when, as a policy matter, the latter interest outweighs the former. The Court reasoned that, given the complexities of government with the delegation and redelegation of authority, the protection of the doctrine should not be limited to "high government officials." So long as an act is done within the scope of an officer's authority, the pertinent inquiry is whether the act involves the exercise of discretion by a government officer which justifies the protection of the doctrine.

We applied the doctrine in *Garner v. Rathburn*, 346 F.2d 55 (10th Cir. 1965). In that case, an injured military laborer sought to recover against the civilian supervisor of a military paving maintenance crew, alleging that the supervisor was negligent in causing defective equipment to be used. We held the suit was barred by the doctrine of official immunity; selecting equipment was within the scope of the supervisor's duties and demanded exercise of judgment and discretion of such nature as to warrant the absolute protection of the doctrine. We discussed the nature of official immunity:

> The federal standard of immunity indicates that officials of the Federal Government are not

> personally liable for alleged torts which result from acts done within the framework or scope of their duties which necessarily involve the exercise of discretion which public policy requires be made without fear of personal liability. . . . The purpose for the rule of the immunity is obvious. Government officials must be free to perform their duties unafraid that what they do may result in personal damage suits. (Footnotes omitted.)

346 F.2d at 56.

The first question in applying the doctrine, whether the conduct was in the scope of an officer's duties, has been the source of some confusion. As Judge Hand wrote in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949):

> [I]t can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exrecise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within the scope of his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.

177 F.2d at 581. It is thus clear that so long as a given function is within the scope of an officer's authority, that he performs it unlawfully does not carry it outside that scope.

It was among the duties of the IRS officers in the present case to levy on property pursuant to jeopardy assessments. Although they did so unconstitutionally, they were acting within the scope of their duties.

Is the duty of levying upon property in satisfaction of IRS jeopardy assessments of such a nature as to justify the absolute protection of the doctrine? In *Sowders v. Damron*, 457 F.2d 1182 (10th Cir. 1972), we held the doctrine of official immunity protected an IRS officer from civil liability for fraudulently obtaining the signature of a taxpayer on a return. The IRS agents cite this case for the proposition that they are entitled to official immunity for all acts done within the scope of their duties. It may well be, however, that the scope of an officer's duties includes acts for which he is entitled to immunity as well as acts for which he is not, for the nature of the particular duty performed determines the applicability of the doctrine. *Doe v. McMillan*, 412 U.S. 306 (1973); *Barr v. Matteo, supra; Jackson v. Kelly*, ... F.2d ..... (10th Cir. 1977). In the present case, the tax liability had been established by the jeopardy assessments, and it had been determined that the assets of Corporation were subject to levy to satisfy Norman's obligation. The agents were directed to seize the assets. The agents' acts were ministerial: The policy decisions had been made; the agents were only to implement the levy. We do not believe the agents, in levying on Corporation's assets, were performing a function "which necessarily involve[d] the exercise of discretion which public policy requires be made without fear of personal liability." *Garner v.*

Rathburn, supra. The fearless, vigorous, and effective administration of the policies of government spoken of in *Barr v. Matteo* can be pursued without the protection of absolute immunity here. A contrary holding would leave aggrieved citizens without a remedy even for malicious Fourth Amendment incursions.[4]

That is not to say that IRS officers are entitled to no protection whatsoever. In *Bivens v. Six Unknown Federal Narcotics Agents*, 456 F.2d 1339 (2nd Cir. 1972), the Second Circuit similarly rejected a claim of absolute immunity to suit for Fourth Amendment incursions by federal police officers. However, the court held that an officer is protected from liability if he acts on a good faith belief that his conduct is not improper, so long as that belief is reasonable. An analogous "limited immunity" is recognized in suits against state officers brought under 42 U.S.C. § 1983. *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Pierson v. Ray*, 386 U.S. 547 (1967). Such a rule strikes an equitable balance between the conflicting interests dealt with previously: The right of private citizens to seek judicial redress is preserved as to malicious abuses; the effective function of government is unhampered as long as conduct is based upon an officer's honest and reasonable belief in its lawfulness.

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[4] As the Supreme Court pointed out: "Indeed, one of the primary evils intended to be eliminated by the Fourth Amendment was the massive intrusion on privacy undertaken in the collection of taxes pursuant to general warrants and writs of assistance." ..... U.S. at .....; 50 L.Ed. 2d at 545.

We believe the record is sufficient to support a determination of the agents' good faith.[5] In this regard, Corporation argues that in conducting the audit and determining the assessment, the officers were motivated by a vendetta against Norman. These matters, even assuming their correctness, are peripheral; the issue is not the officers' attitude generally but whether they believed they were acting in accordance with the law in entering the cottage without a warrant.

Of principal importance is the undisputed fact that the officers conducted the seizure upon the advice of IRS regional counsel. It makes no sense to expect the officers to second-guess the IRS regional attorney who counseled them that the seizure could be undertaken as it was. In a similar case, *Jackson v. Wise*, 385 F. Supp. 1159 (D. Utah 1974), the fact that an IRS agent acted on advice of counsel was held sufficient to support a finding that his actions were in good faith. We are satisfied that the officers entered the cottage on the reasonable and good faith belief that their conduct was lawful. Corporation is not entitled to recover damages against them.

The case is reversed and remanded to the district court with directions to dismiss the action.

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[5] The district court found that "Defendant Philip Clayton maliciously committed said forced entry, and search and seizure." We specifically rejected that finding, stating "[p]art of the basis for the trial court's ruling . . . appears to be a finding that appellant Clayton's participation in the search and seizure was of a malicious character. There is no evidence in the record to support this finding, and we must hold that it is clearly erroneous." 514 F.2d at 940-941.